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IN THE

Supreme Court of the United States.

No. 634.

October Term, 1951.

ANTOINETTE TUREK,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Supreme Court of Pennsylvania (R. 138) is reported in 369 Pa. 341, 85 A. 2d 845.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Stat. 929 (28 U. S. C. Section 1257).

QUESTION PRESENTED.

Whether the Supreme Court of Pennsylvania erred in entering judgment for respondent on the ground that under the federal rule petitioner's evidence was insufficient to prove that her injuries were caused by respondent's wilful or wanton negligence.

STATUTE INVOLVED.

The statute involved is the Hepburn Act, as amended, 34 Stat. 584, 49 U. S. C. Section 1(7).

STATEMENT.

The petitioner, Antoinette Turek, was injured on February 18, 1947, in the derailment of respondent's Train No. 68 in which she was a passenger on a free interstate pass containing a release of liability for negligent injury (R. 106a-110a). The derailment occurred at the Bennington Curve near Altoona, Pennsylvania, where the tracks lay on top of an embankment 90 feet high, sloping downward at an angle of one vertical foot to every two horizontal feet (R. 22a). No. 2 track eastbound, on which the train was traveling on the night of the accident, had a 35 miles-per-hour speed limit on the down-grade approach to the curve and a 30 mile limit on the curve itself (R. 12a).

Petitioner testified that she had traveled over the curve before, and as the train entered the down-grade approach to the curve on the night of the accident, instead of slowing down it picked up speed (R. 24a), her car began to sway, bumped along the track, turned over on its left side, and went down the embankment (R. 24a).

Respondent's Division Superintendent Morris, who was called as a witness by petitioner, read figures from a blueprint indicating that some of the cars remained on the track and some were dispersed several hundred feet down the embankment from the point of derailment (R. 14a-18a). Engineman Billig, who was operating the lead engine at the time of the accident, stated that he knew of the existence of the curve and the speed limit (R. 30a).

Petitioner offered no testimony as to the cause of the derailment and no other evidence to attempt to establish that her injuries were sustained as the result of respondent's wilful or wanton negligence.

For respondent Engineman Billig was recalled and testified that the train was 58 minutes late leaving Pittsburgh and lost five more minutes from there to AR, the last block tower west of the point of derailment (R. 37a). At AR he made a running road test of his brakes and found them

in good operating condition (R. 32a). Coming out of the tunnel on the down-grade approach to the curve the train was traveling 25 miles per hour (R. 33a). He set the train brakes in the usual manner (R. 33a) and as the train entered the curve it was traveling about 22 miles per hour (R. 34a). He felt a bump as though a spring hanger on one of the driving wheels had broken (R. 35a); then the injector pipe released a jet of steam which struck his face and chest and he remembered nothing after that (R. 35a).

J. H. Ryan was the block operator at AR who controlled the signals and train movements in that area on the morning of the accident. He testified from his record that No. 68 made its usual brake test as it passed his tower at 3:17 (R. 49a). It made the run to AR from MO, the tower two miles west of AR, in six minutes, although the regular running time was three minutes (R. 50a). Train No. 76, another passenger train which was following No. 68 on the same track, traveled the same distance in four minutes (R. 48a). Train No. 76 was switched off Track No. 2 to Track No. 1 because it appeared to be overtaking No. 68, and the operator therefore wanted to allow it to pass around No. 68 (R. 48a). Ryan determined that the wreck occurred at 3:22 A. M. because that was when the indicator lights on his track board went out (R. 47a).

P. W. Patterson, block operator at MO tower, testified from his record that No. 68 passed his tower at 3:11 on Track No. 2 (R. 79a). According to his record it had passed NY, eight miles west of MO, at 2:58, making that run in 13 minutes, although the normal schedule was 12 minutes (R. 79a, 81a). Train No. 76 made the run between NY and MO in 12 minutes (R. 81a). Patterson warned AR tower that Train No. 68 was not keeping its schedule, and for that reason Train No. 76, which was following it, was switched from Track No. 2 to Track No. 1 (R. 80a, 81a) to pass around it.

T. W. Ryan, block operator at MG tower, the next tower east of AR, testified from his record that Train No.

68 passed AR on Track No. 3 at 3:17, followed by Train No. 76 at 3:21 (R. 84a).

Superintendent J. D. Morris testified from the Pittsburgh train dispatcher's record that Train No. 68 passed SO tower, 8.6 miles west of NY, at 2:50 A. M. on the morning of the accident and that it covered the distance between those two towers at a rate of 45 miles per hour, although the speed limit was 70 miles per hour (R. 88a, 89a). Between NY tower and MO tower the train traveled at 39½ miles per hour, although the speed limit was 70 miles an hour (R. 89a). Since the train was 1314 feet long, when its rear end cleared AR tower, which is when its passing time was recorded, its head end was 1.87 miles from the point of derailment (R. 91a). Morris calculated the speed of the train for that distance on a five minute run at 22.4 miles per hour (R. 93a).

Morris was qualified as an expert witness on railroad wreck investigations and testified that considering the weight of the train, a speed of 30 miles per hour, the steepness of the down-grade and the degree of curvature, 1000 feet from the point of derailment would not have been an excessive distance for the equipment to have traveled after the derailment (R. 96a, 97a). Even at 22 miles per hour the equipment could have been expected to travel further down the embankment than the distances shown on the blueprint of the scene of the accident (R. 14a-18a, 97a). He was cross-examined on a paper purporting to be a table of train speeds on curves and read from that table the equilibrium, comfortable, safe and overturning speeds of a locomotive on an 8 degree curve with a three inch superelevation (R. 102a). He testified that in fixing speed limits a considerable margin of safety is allowed between the limit imposed and the speed at which there would be a dangerous loss of equilibrium (R. 99a, 100a).

The trial judge refused respondent's motion for a directed verdict, and the case was submitted to the jury on a charge setting forth the standard of proof of wilful

and wanton negligence which is applied both in the federal and in the Pennsylvania cases (R. 112a, 113a, 114a). The jury returned a verdict of $15,000 on which judgment was entered by the trial court in favor of petitioner.

The Supreme Court of Pennsylvania reversed that judgment and entered judgment in favor of respondent on the ground that under the federal rule, with which the Pennsylvania cases are in accord, the evidence was insufficient to sustain a verdict in favor of petitioner (R. 138-142).[1] In its opinion that Court described the federal rule with the phrase that is used in the Pennsylvania cases, "wilful or wanton misconduct" (R. 139). Subsequently petitioner filed a petition for reargument with the Supreme Court of Pennsylvania, asserting that the Court had applied an erroneous standard because of a nominal difference between the federal rule of "wanton negligence" and the Pennsylvania rule of "wanton misconduct" (R. 144-147). Since the two rules were in fact identical (R. 150, 151), the Supreme Court of Pennsylvania refused the petition for reargument.

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1. One justice dissented on the sole ground that in his opinion the evidence was sufficient to sustain the verdict under the principle which he, the trial judge and the majority of the Court accepted as controlling (R. 142-144).

ARGUMENT.

The petition demonstrates that this case does not meet the requirements of this Court for the granting of a writ of certiorari. The only question presented is the application to the evidence in this case of a recognized legal principle, accepted alike by the federal and Pennsylvania courts. The standard used by the Pennsylvania Supreme Court in determining the sufficiency of the evidence is the same standard that is applied in the federal cases. Petitioner's objections go solely to the name by which that standard was called by the Pennsylvania Supreme Court and not to its substance or its applicability.

Under the federal rule, which requires proof of wilful or wanton negligence or misconduct, petitioner's evidence was insufficient to sustain a judgment in her favor, and the decision of which review is sought was therefore correct.

I. The Decision Below Depends Entirely Upon an Evaluation of the Evidence.

The only question that was considered by the Supreme Court of Pennsylvania in deciding the case in favor of respondent was the sufficiency of the evidence to sustain a judgment in favor of petitioner, an interstate passenger on a free pass containing a release of the railroad company's liability for negligence. Both the trial court (R. 112a-114a, 129a, 130a) and the Supreme Court of Pennsylvania (R. 139, 140) recognized and applied the federal rule, most recently set forth by this Court in *Francis v. Southern Pacific Co.*, 333 U. S. 445 (1948), that in such a case recovery can be had only upon evidence of "wilful or wanton negligence".[2] The decision of the Supreme Court of Pennsyl-

2. The trial court, whose judgment petitioner seeks to reinstate, acknowledged that this rule "is often called 'wanton or wilful misconduct'" (R. 130a) and stated that the jury correctly found respondent "guilty of *wanton misconduct*" (Emphasis supplied) (R. 129a). And in *Kasanovich, Admrx., v. George*, 348 Pa. 199, 202, 34 A. 2d 523, 525 (1943), the Supreme Court of Pennsylvania, in an opinion by the dissenting justice in this case, pointed out that there is no difference in substance between "wanton negligence" and "wanton misconduct."

vania turned wholly on its evaluation of the evidence offered by petitioner measured by this standard.

This Court has often said, and did so in one of the cases relied on by petitioner, *New York Central Railroad Co. v. Mohney,* 252 U. S. 152, 157 (1920), that it does not weigh the evidence in cases of this kind. Cf. *Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans,* 134 F. 2d 275 (5th Cir. 1943), *cert. den.* 319 U. S. 756 (1943). The Supreme Court of Pennsylvania found that there was no evidence in the record from which any reasonable inference in support of the jury's finding could be drawn, and in that situation this Court has regularly denied certiorari. *Healy v. Pennsylvania Railroad Co., cert. den.* 340 U. S. 935 (1951); *Roberts v. Alabama Great Southern Railroad Co., cert. den.* 340 U. S. 829 (1950); *Emmick v. Baltimore & Ohio Railroad Co., cert. den.* 340 U. S. 831 (1950); *Roberts v. Missouri-Kansas-Texas Railroad Co., cert. den.* 340 U. S. 832 (1950); *Gentry v. Seaboard Air Line Railroad Co., cert. den.* 340 U. S. 853 (1950). See also: *Layne & Bowler Corp. v. Western Well Works,* 261 U. S. 387, 393 (1923); *Wilkerson v. McCarthy,* 336 U. S. 53, 66-73 (concurring opinions) (1949).

II. The Pennsylvania Supreme Court Applied the Federal Rule in Determining the Sufficiency of the Evidence.

Petitioner's argument that the decision of the court below raises an issue of law is based upon a preoccupation with labels rather than upon any matter of substance. This is apparent from her contention that the error of the Supreme Court of Pennsylvania lay in its substitution of "'the term 'wilful or wanton misconduct' for the term 'wilful or wanton negligence'" (p. 3, Petition for Certiorari). Regardless of the names by which they are called, the principles applied in the federal and Pennsylvania cases are identical.[3] That those names are neither precise nor uni-

3. The loose terminology used by the courts in identifying these principles has often been recognized. See, for example, *Restatement of Torts,* Section 500, Special Note; *Prosser on Torts* (1941 ed.) pp. 260-262; and footnote 2, p. 6; Respondent's Brief.

formly used appears from a comparison of *Francis v. Southern Pacific Co.*, 333 U. S. 445 (1948), where the name of the liability-creating conduct is "wilful or wanton negligence", with *Bowman v. Pennsylvania Railroad Co.*, 299 Pa. 558, 566, 149 Atl. 877, 880 (1930), characterized by petitioner as recognizing "the true federal rule" (p. 10, Petition for Certiorari), where it is called "wilful, wanton, or gross negligence", and *Swain v. American Mutual Liability Ins. Co.*, 134 F. 2d 886, 887 (5th Cir. 1943), where the name is "wanton negligence or misconduct."

The Supreme Court of Pennsylvania, as did the trial court and the dissenting justice, used as its standard in evaluating the evidence in this case Section 500 of the *Restatement of Torts* which was quoted in its entirety, together with its own paraphrase of that principle set forth in *Kasanovich, Admrx. v. George*, 348 Pa. 199, 203, 34 A. 2d 523, 525 (1943) (R. 139, 140). The identical section of the *Restatement of Torts* is the substance of the federal rule stated in *Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans*, 134 F. 2d 275 (5th Cir. 1943), *cert. den.* 319 U. S. 756 (1943), on which petitioner relies to demonstrate an imagined distinction between wanton misconduct and wanton negligence.

To set down the *Restatement* rule beside the *Kasanovich* rule is to demonstrate their exact equivalence:

Section 500, Restatement of Torts	*Kasanovich rule* 348 Pa. p. 203, 34 A. 2d p. 525
"The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to	"It must be understood, of course, that wanton misconduct is something different from negligence, however gross,—different not merely in degree but in kind, and evincing a different state of mind on the part of the tortfeasor. Negligence

Section 500, Restatement of Torts	*Kasanovich rule* 348 Pa. p. 203, 34 A. 2d p. 525
realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result."	consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong."

These principles were fairly applied to the facts of this case by the Pennsylvania Supreme Court (369 Pa. at p. 344, 85 A. 2d at p. 847):

> "We have examined this record in vain for any evidence upon which a jury properly could have predicated a finding that defendant's engineer, from the facts known to him, should have realized the imminent danger of derailment and injury to the train's passengers and, with a conscious disregard of the consequences of his act, he operated his train and permitted it to be derailed." (R. 140)

Cf. *Westre v. Chicago M. & St. P. Ry. Co.*, 2 F. 2d 227, 230 (8th Cir. 1924).

Petitioner's sophistical argument is illustrated by her discussion of *Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans*, 134 F. 2d 275 (5th Cir. 1943), *cert. den.* 319 U. S. 756 (1943). On that case alone she pitches her claim of a "danger presented to the rights of a user of a free pass under the federal law by substitution of the term wanton misconduct for wanton negligence" (p. 12, Petition for Certiorari). A single sentence she plucks from its context in the dissenting opinion in the

Evens case and from it assumes to find a difference between the standard applied by the majority, which she describes as "wanton negligence", and the standard used by the dissenting judge, which she describes as "wanton misconduct" (p. 12, Petition for Certiorari). In fact, however, the dissenting judge there stated, "I am in complete agreement with my brothers' statement of the principle which controls this case" *id.* at p. 277, and in both majority and dissenting opinions Section 500 of the *Restatement of Torts* was followed. The only dispute in the *Evens* case between the majority and dissenting opinions, precisely as in the instant case, was in the application of this mutually accepted principle to the evidence.

That the Court of Appeals for the Fifth Circuit, on whose opinions in the *Evens* case petitioner relies to demonstrate her specious distinction between the labels "wanton misconduct" and "wanton negligence", recognizes no distinction between them is clear from its *unanimous* decision of a case considered within a month of the *Evens* case, *Swain v. American Mutual Liability Ins. Co.*, 134 F. 2d 886 (5th Cir. 1943). In the *Swain* case the same judges sat who decided *Evens*, and the court stated (at p. 887):

> "In the recent case of Evens v. Texas Pacific-Missouri Pacific Terminal R. R. of New Orleans, we had occasion to review the subject of *wanton negligence or misconduct* and there defined it to mean an act (or failure to act when there is a duty to act) in reckless disregard of the rights of another, coupled with a consciousness that injury is a probable consequence of the act or omission." (Emphasis supplied.)

It is therefore clear from the very authorities on which petitioner relies that the substance of the wanton misconduct rule is the precise equivalent of the wanton negligence rule, regardless of the name by which it is called.

In measuring the sufficiency of petitioner's evidence the Pennsylvania Supreme Court applied the federal rule,

whether it is called "wilful or wanton negligence" or "wilful or wanton misconduct."

III. The Pennsylvania Supreme Court Was Correct in Holding That the Petitioner Failed to Prove Wilful or Wanton Negligence.

In this case petitioner proved that a derailment occurred; that shortly before the derailment the car in which she was traveling swayed and bumped and jostled passengers about (R. 24a); that as the result of the derailment some of the cars were dispersed several hundred feet down a steep embankment on which the curve was laid (R. 14a-18a); and that the engineman knew that there was a speed limit on the curve and on its approach (R. 30a). She offered no direct or even opinion evidence of the train's rate of speed at the time of derailment. That was all of petitioner's evidence on liability.

That evidence, as the Supreme Court of Pennsylvania properly held, could not support a reasonable inference that there was excessive speed or any other act or omission amounting to wilful or wanton negligence. Under the federal rule petitioner had to show that, from facts known to the engineman *before the accident*, he should have realized the high degree of probability that a derailment would occur, and nevertheless so operated his train that it did occur. Petitioner's evidence failed to meet this standard, and the Supreme Court of Pennsylvania so held.

Even if it be assumed that the speed of the train had something to do with the accident, which, under the evidence would be pure speculation, the evidence here was far weaker than in *Delaware and H. R. Corp. v. Bonzik*, 105 F. 2d 341 (3d Cir. 1939), another derailment case. There the Court of Appeals for the Third Circuit held the evidence insufficient to establish wilful or wanton negligence, *despite positive proof that the train was traveling at more than double the speed limit at the time of the accident.*

In this case it was established merely that there was a speed restriction which was fixed primarily to assure passenger comfort, but there was no evidence offered to show that the prescribed limit was exceeded. Thus, while merely exceeding that limit, of which there was no proof, might have resulted in some passenger discomfort, it would certainly not have resulted in a "present or highly probable danger" of derailment. Nor would the engineman's knowledge of the *mere existence* of the speed limit, which was the *only* knowledge he had (R. 30a), justify an inference by the jury that exceeding it would carry with it a realization of imminent derailment. There was accordingly no evidence whatever that at the time of the accident the engineer knew or had reason to know of any present or highly probable danger to the passengers on his train.

The two cases on which petitioner relies to support her theory of recovery are readily distinguishable. In *New York Central Railroad Co. v. Mohney,* 252 U. S. 152 (1920), the engineer disregarded two block signals that were set against him, an obvious indication of highly probable danger ahead, and collided with the rear end of another train standing on the same track. In the instant case not only is there no competent proof that the train exceeded the speed limit, but the evidence shows that the speed limit was fixed with a "considerable margin of safety" before a point would be reached at which a dangerous loss of equilibrium would occur (R. 99a, 100a). As to *Pennsylvania Railroad Co. v. Goldie,* 182 F. 2d 9 (6th Cir. 1950), it is sufficient to note that that case was decided upon a record wholly different from the record in this case, and it was therefore properly rejected as a precedent by the Supreme Court of Pennsylvania.

There is no evidence, other than the mere fact of the derailment, that the accident was caused by the operation of the train at an excessive speed, and a fortiori there was none to support a finding that the operation of the train was such as to constitute wilful or wanton negligence. The

dispersal of the equipment after the derailment was, of course, subject to the elementary physical principle that the weight of a 1626 ton train (R. 86a) descending a 1.73 degree grade would of itself carry some of the cars down the steep embankment on which the curve was laid. Moreover, the only expert witness who testified on the subject, whose technical qualifications were admitted by the petitioner (R. 96a), testified that the dispersal of the equipment was far less than might reasonably have been expected in view of the size and weight of the train, the grade, and the curvature of the track (R. 97a). That witness testified that the dispersal was entirely consistent with a speed well below the speed limit on the approach to the curve and the curve itself (R. 97a). To that evidence must be added the affirmative and uncontradicted evidence that for the last 20 miles before the accident the train was not even maintaining its regularly scheduled speed, and that as it approached the point of the accident it was running within the prescribed speed limits.[4]

On this record the Supreme Court of Pennsylvania properly concluded that there was a total failure of proof of wilful and wanton negligence which was petitioner's acknowledged burden under the applicable federal rule.

CONCLUSION.

The respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

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4. During the last twenty miles of its run, Train No. 68 was well behind the normal running time and losing ground to Train No. 76, another passenger train, to such an extent that No. 76 had to be switched to another track because of the danger of overtaking it (R. 48a, 80a, 81a, 88a-91a).